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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Rocio Brenda Henriquez-Rivas Petitioner,	)	Case File No.09-71571
v.	)	Immigration File No. A098-660-718
United States Attorney General, Respondent	)	Petition for Rehearing En Banc Under FRAP 35

I. INTRODUCTION

Petitioner, Rocio Brenda Hernirquez-Rivas ("Petitioner"), submits this timely Petition for Rehearing En Banc of this court's entry of judgment dated July 7, 2011. A panel of this court denied the petition for review because it was bound by this court's prior precedents which held that government witnesses and criminal informants could not qualify for asylum in the United States as members of a "particular social group," as required under INA §101(a)(42)(A); 8 U.S.C. §1101(a)(42)(A). Petitioner's proposed social group consisted of "Persons who testified in open court against gang members in El Salvador." In denying the petition, the court concurred with the Board of Immigration Appeals ("Board") that

the proposed group lacked sufficient "particularity" and "social visibility" to qualify as a particular social group for purposes of asylum.

Two members of the panel, Judge Bea and Judge Ripple, however, concluded that the group proposed by Petitioner had sufficient "social visibility" and "particularity" in Salvadorian society to satisfy the standard as set forth by the Board in Matter of C-A-, 23 I. & N. Dec. 921 (BIA 2006). The two panel members also concluded that this court had applied the "particularity" requirement inconsistently in its various cases and urged further examination of this issue "to ensure that our precedent accurately tracks the language of the INA and affords proper deference to the [Board]'s proclamations on the matter." Henriquez-Rivas v. Holder, 09-71571, Page 17 (9th Cir. 9-7-2011).

II. CONSIDERATION BY THE FULL COURT IS NECESSARY TO RESOLVE THIS COURT'S INCONSISTENT HOLDINGS ON THIS ISSUE OF WHAT CONSTITUTES "MEMBERSHIP IN A PARTICULAR SOCIAL GROUP" FOR PURPOSES OF ASYLUM IN THE UNITED STATES

Petitioner seeks a rehearing en banc because this case involves questions of exceptional importance for the following reasons: (1) This court has interpreted the term "membership in a particular social group" inconsistently in its various precedential decisions; (2) This court's various decisions on this issue are in conflict with the Board as well as with other circuit courts; and (3) in light of the

large number of cases in this circuit on this issue, further examination by an en banc panel is necessary.

III. STATEMENT OF THE FACTS AND THE CASE

Petitioner is a 23-year old native and citizen of El Salvador who is charged with removal from the United States for being present in the country without authorization. INA §212(a)(6)(A)(i), 8 U.S.C. §1182(a)(6)(A)(i). Petitioner concedes removability as charged but seeks asylum under INA § 208, 8 U.S.C. §1158; withholding of removal under INA §241(b)(3), 8 U.S.C. §1231(b)(3); and relief under Article III of the United Nations Convention Against Torture (hereinafter "CAT").

Petitioner fears returning to her home country because at the age of 12 she witnessed her father's murder at the hands of a criminal gang in El Salvador called the Mara Salvatrucha ("MS"). She courageously testified in open court against the gang members who had cold-bloodedly murdered her father in his own house. Based on Petitioner's testimony, the gang members were convicted and sent to prison. Unfortunately, after the trial, suspected MS members visited Petitioner's home and school to look for her. Fearing for her life, Petitioner fled El Salvador and applied for asylum in the United States.

On May 7, 2007, following an evidentiary hearing, an Immigration Judge ("IJ") at the San Francisco Immigration Court granted Petitioner's application for

asylum on the ground that Petitioner had a well-founded fear of returning to El Salvador because she was a member of a "particular social group" consisting of "Persons who testified in open court against gang members in El Salvador." The IJ concluded that testifying against gang members in El Salvador was a shared past experience which was immutable and was fundamental to Petitioner's identity.

The United States Department of Homeland Security ("DHS") appealed the IJ's decision to the Board which reversed. The Board concluded that the proposed social group failed the "social visibility" and "particularity" tests as set forth by Board in Matter of C-A-, *supra*. The Board stated that it was not persuaded by Petitioner's "apparent attempt to equate El Salvador's enactment of a witness protection law in that country to the definition of a refugee under the United States immigration law." Certified Administrative Record ("A.R.") at 3-4.

In her petition for review to this court, Petitioner argued that the Board erred as a matter of law in concluding that the proposed social group offered by the Petitioner lacked sufficient "particularity" and "social visibility" to qualify for asylum. Petitioner argued that her proposed group was socially visible in Salvadorian society as evidenced by the enactment of a special witness protection law to protect people like Petitioner from gang retaliation. In addition, the proposed group satisfied the "particularity" requirement because the identities of

people who testify in open court against gang members is easily verifiable through court records.

The Attorney General responded that Petitioner's argument—Persons who testify against gang members in open court are members of a particular social group—was foreclosed by this court's decisions in Soriano v. Holder, 569 F.3d 1162, 1165 (9th Cir. 2009) (holding that a class of government informants against Filipino criminal gangs is not a cognizable social group) and Velasco-Cervantes v. Holder, 593 F.3d 975, 978 (9th Cir. 2010) (finding that material witnesses for the United States government's prosecution of alleged alien smugglers do not constitute a particular social group).

The panel agreed with the Attorney General that it was bound by this court's precedents that Petitioner's proposed social group did not qualify for asylum in the United States. However, two concurring members of the panel also stated that were they writing on a clean slate, they would have held that Petitioner's proposed group satisfied the "social visibility" and "particularity" requirements to qualify for asylum.

Judge Bea explained that neither the Board nor this court has clearly explained in its decisions what factors were relevant in determining the "particularity" and "social visibility" requirements for membership in a particular social group. For example, in Santos-Lemus v. Mukasey, 542 F.3d 738, 745-46

(9th Cir. 2008), this court held that social visibility requires that the group be recognizable by others in the community. However, the court did not specify what the relevant community was for purposes of the analysis?

This court's analysis of the "particularity" factor is also inconsistent. As Judge Bea stated:

> Given the current confusion in our law, there is discernible basis for these divergent outcomes—other than, perhaps, a given panel's sympathy for the characteristics of the group at issue. Somalian women threatened with female genital mutilation are a particular social group, Mohammed v. Gonzales, 400 F.3d 785 (9th Cir. 2005), while government witnesses threatened with death for their testimony against violent gang members are not, Soriano, 569 F.3d at 1166. Mexican men with female sexual identities are a particular social group, Hernandez-Montiel, 225 F.3d at 1084, while teenage boys in Honduras threatened with death for resisting MS-13 recruitment are not. Ramos-Lopez v. Holder, 563 F.3d 855, 861 (9th Cir. 2009). A petitioner fighting for her right to remain in this country and avoid persecution in her native land deserves a legal system governed not by the vagaries and policy preferences of a given panel, but by well-defined and consistently-applied rules.

Bea, Circuit Judge, at page 13.

Finally, Judge Bea explained that this court's decisions on "particular social group" were in conflict with the Fourth, Sixth, and Seventh Circuits. For example, *See* Crespin-Valladares v. Holder, 632 F.3d 117 (4th Cir. 2011) (family members of people who testify against gang members were members of particular social group); Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009) (former members of the Mara Salvatrucha gang were membership a particular social group); Urbina-Mejia

v. Holder, 597 F.3d 360 (6th Cir. 2010) (holding that former members of the "18th Street Gang" in Honduras constituted a particular social group for asylum).

IV. ARGUMENT

A. THE BOARD FAILED TO PROVIDE A REASONABLE EXPLANATION AS TO WHY PETITIONER'S CLAIMED SOCIAL GROUP LACKED "PARTICULARITY" AND "SOCIAL VISIBILITY" IN SALVADORIAN SOCIETY TO QUALIFY AS PARTICULAR SOCIAL GROUP UNDER SECTION 101(a)(42)(A) OF THE IMMIGRATION & NATIONALITY ACT

In Matter of Acosta, the Board defined a "social group" as "a group of persons all of whom share a common, immutable characteristic." Matter of Acosta, 91 I. & N. Dec. at 233. An immutable characteristic, as defined by the Board, need not be an innate characteristic like race or sex (setting aside the possibility of sex-change operations); it just has to be something that cannot be changed or is so fundamental that should not be forced to change; and thus it includes "shared past experience." Id. at 233. Shared past experience includes: former military leadership or land ownership, etc. Id.

In Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986), this court adopted a "voluntary associational relationship" definition of a social group which consisted of "a collection of people closely affiliated with each other, who are actuated by some common impulse or interest." However, in a more recent decision, Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000), this court recognized that groups sharing immutable characteristics, such as a familial

relationship, or one's sexual orientation and identity, would not necessarily fit with Sanchez-Trujillo's "voluntary associational relationship" definition. Therefore, it expanded the definition to conform with the Board's definition in Matter of Acosta, and held that a "particular social group is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or conscience of its members that members either cannot or should not be required to change it." Hernandez-Montiel, 225 F.3d at 1093.

Since Acosta, the Board has stated that two key characteristics of a particular social group are particularity and social visibility. *See* Matter of S-E-G-, 24 I. & N. Dec. 579 (BIA 2008). "The essence of the 'particularity' requirement . . . is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons." Id. at 584. Social visibility, on the other hand, requires "that the shared characteristic of the group would be recognizable by others in the community." Id. at 586. Moreover, the shared characteristic "must be considered in the context of the country of concern and the persecution feared." Id. at 586-87.

In the instant case, the Board concluded that Petitioner's particular social group claim failed because it was analogous to the claim raised by the applicant in Matter of S-E-G-, where the Board held that a group consisting of people who

resist gang recruitment lacked particularity and social visibility to qualify as a particular social group under the INA. The Board, however, did not explain why Petitioner's social group lacked particularity and social visibility. The Board simply stated:

> In accordance with our precedent in Matter of S-E-G-, 24 I. & N. Dec. 579 (BIA 2008), we conclude that the entity described by the Immigration Judge in the instant case lacks the requisite "social visibility" to be considered a particular social group within the meaning of the Act.

C.A.R. at 3.

Similarly, as to the particularity issue, the Board stated:

> In this case the [Petitioner]'s reliance on people testifying against gang members is merely a shared experience and not a particular social group within the meaning of the Act. Furthermore, defining the group as persons opposing gang members is too amorphous.

C.A.R. at 3.

The Board's lack of analysis of the particularity and social visibility requirements in this case is a reversible error because it frustrates this court's ability to reach any conclusion on this issue. Principles of administrative law require that the Board must address an issue in the first instance before this court can review it. INS v. Ventura, 537 U.S. 12, 16-17 (2002).

Moreover, the Board ignored major differences between Petitioner's claim and people who resist gang recruitment in El Salvador. In Matter of S-E-G-, the Board concluded that a group consisting of young people who resist gang

recruitment was too numerous and amorphous, and lacked a unifying characteristic, to qualify as a particular social group. Such a group, the Board concluded "make up a potentially large and diffuse segment of society, and the motivation of gang members in recruiting and targeting young males could arise from motivations quite apart from any perception that the males in question were members of a class." Id. at 585.

Petitioner's particular social group—Persons who testify against gang members in open court—is not too numerous and amorphous, and its members share a unifying experience which easily identifies them in society. For example, because most people in El Salvador have not testified against gang members in court, this group is not too numerous and amorphous. Moreover, people who testify against gang members in court are easily identifiable based on their experience. It is this shared past experience which would motivate their persecutors to target and persecute these people in the future.

The key component of the social visibility test is how the group is perceived by society. Id. at 586-87. In other words, a group's visibility—the extent to which members of society perceive those with the characteristics as members of social group—is relevant. Matter of C-A-,23 I. & N. Dec. at 959-60. In Matter of S-E-G-, the BIA stated that "[t]here is little in the background evidence of record to indicate that Salvadorian youth who are recruited by gangs but refuse to join (or

their family members) would be 'perceived as a group' by society, or that these individuals suffer from a higher incidence of crime than the rest of the population." Id. at 587.

In the instant case, the Board ignored the fact that people who testify against gang members in court are highly visible and easily identifiable in society. These people are also specifically recognized by the Salvadorian government as requiring special protection under the law. Due to the risks faced by people who testify against gang members, the Salvadorian legislature has enacted a special witness protection law. This law specifically offers protection to people who face retaliation from organized crime in El Salvador.

Furthermore, in concluding that Petitioner's claimed social group lacked social visibility, the Board completely ignored its own reasoning in Matter of C-A. In that case the Board held that confidential noncriminal informants against Colombian drug cartels lacked social visibility because the very nature of the conduct at issue was out of public eye. Id. at 960. The Board stated:

> When considering the visibility of groups of confidential informants, the very nature of the conduct at issue is such that it is generally out of public view. In the normal course of events, an informant against the Cali Cartel intends to remain unknown and undiscovered. **Recognizability or visibility is limited to those informants who are discovered because they appeared as witnesses** or otherwise come to the attention of the cartel members.

Id. at 960.

Thus, in Matter of C-A-, the Board implied that informants who testify in court, in certain situations, may qualify as members of a particular social group.

Therefore, the Board committed a reversible error by failing to provide a reasonable explanation as to why people who testify against gang members in El Salvador lack "particularity" and "social visibility" in society to be considered as members of a particular social group.

B. PETITIONER IS A MEMBER OF A "PARTICULAR SOCIAL GROUP" UNDER SECTION 101(a)(42)(A) OF THE IMMIGRATION & NATIONALITY ACT BECAUSE HER SHARED EXPERIENCE OF TESTIFYING AGAINST GANG MEMBERS IN EL SALVADOR IS AN IMMUTABLE CHARACTERISTIC WHICH IS NOW FUNDAMENTAL TO HER IDENTITY, AND LIKELY TO MOTIVATE GANG MEMBERS TO SEEK HER AND PERSECUTE HER IN THE FUTURE

In Matter of Acosta, the Board recognized that a shared past experience can be a basis for membership in a particular social group if that experience is the fundamental reason why the group's members would be targeted. Id. at 233. For example, in Matter of Fuentes, 19 I. & N. Dec. 658, 662 (BIA 1988), the Board stated that the applicant's status as a former member of the national police was an immutable characteristic that could serve as a basis of a particular social group.

Using this criteria, the Seventh Circuit recently held that former members of the MS-13 gang were members of particular group because they shared an immutable past experience which could not be changed and would likely to motivate MS-13 members to persecute him in the future. Ramos, 589 F.3d at 426.

Similarly, the Third Circuit has held that child soldiers who escaped after being enslaved by the Lord's Resistance Army, a rebel group in Uganda, were members of a particular social group. *See* Lukwago v. Ashcroft, 329 F.3d 157 (3d Cir. 2003). The court concluded that the petitioner's former status as a child soldier was unfortunately an immutable characteristic which is now fundamental to his identity and would place him in grave danger from the LRA for the rest of his life. *See also* Gomez-Zuluaga v. Attorney General, 527 F.3d 330 (3d Cir. 2003) (Colombian women who have escaped involuntary servitude after being abducted and confined by the Colombian guerrillas may constitute members of a particular social group).

In Matter of C-A-, the Board reaffirmed the Acosta test and reiterated that a shared past experience was an immutable characteristic that could serve as the basis of a particular social group. However, the Board reasoned that the group's past experience must be the central reason why it is targeted for persecution. Id. at 958. For example, an individual who is targeted due to her status as a former police officer may be eligible for asylum as a member of a particular social group of former police officers. But, a former police officer singled out for reprisal because of his role in disrupting a particular criminal activity would likely not be eligible for asylum. Id. at 958-59. This is because in the second scenario, the

persecution the applicant fears is not simply a result of her status as a former police officer, but is specific to her particular circumstances.

Petitioner satisfies the Acosta test based on her membership in a group of people united by a shared past experience of testifying against gang members. This group consists of people who share a common immutable experience which would motivate gang members to target and persecute them in the future. This group is not too numerous and amorphous to lack particularity, and it is socially visible in society because its members testify publically against gang members. Moreover, society recognizes members of this group as a distinctive entity because the Salvadorian legislature has enacted a special witness protection law to protect members of this group.

Therefore, Petitioner's particular social group claim satisfies the Acosta test.

V. CONCLUSION

Petitioner humbly requests the En Banc Court to rehear this case. Petitioner seeks a rehearing en banc because this case involves questions of exceptional importance for the following reasons: (1) This court has interpreted the term "membership in a particular social group" inconsistently in its various precedential decisions; (2) This court's various decisions on this issue are in conflict with the Board as well as with other circuit courts; and (3) in light of the large number of

cases in this circuit on this issue, further examination by an en banc panel is necessary.

Dated: October 7, 2011.

Respectfully submitted

/s/ Saad Ahmad
Saad Ahmad, Esq.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED.R.APP.P. 40-1(a)

I certify that the attached Petition for Rehearing En Banc complies with all the requirements under FRAP 35 and FRAP 32(c), and limited to 15 pages.

CERTIFICATE OF SERVICE

I certify that on this 7th day of October 2011. I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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No. 09-71571

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROCIO BRENDA HENRIQUEZ-RIVAS,

Petitioner,

v.

ERIC H. HOLDER, Jr., Attorney General,

Respondent.

ON PETITION FOR REVIEW OF A FINAL ORDER OF
THE BOARD OF IMMIGRATION APPEALS
Agency No. A098-660-718

RESPONDENT'S OPPOSITION TO PETITIONER'S PETITION FOR REHEARING EN BANC

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REGULATION

INTRODUCTION

The petition for rehearing en banc raises neither an intra-circuit conflict nor, on the record here, a question of exceptional importance. Instead, the sparse record reflects only a tragic crime and one person's fear of revenge by perpetrators who were convicted. These are facts for which the asylum statute provides no relief – as the panel correctly decided – and the record is simply not developed to support any other theory of relief. Because the case fails to meet the criteria for en banc rehearing specified in Fed. R. App. P. 35, the petition should be denied.

STATEMENT

1. The Attorney General, in his discretion, may grant asylum to an alien who demonstrates that she is a "refugee." *See* 8 U.S.C. § 1158(b)(1)(A). In relevant part, a "refugee" is defined as an alien "who is unable or unwilling to return to . . . h[er] country [of nationality] because of persecution or a well-founded fear of persecution on account of . . . membership in a particular social group." 8 U.S.C. § 1101(a)(42)(A); *see* 8 C.F.R. § 1208.13(b); *Zetino v. Holder*, 622 F.3d 1007, 1015 (9th Cir. 2010). In the Ninth Circuit, a "particular social group" is "defined abstractly as a group united by 1) a voluntary association which imparts some common characteristic that is fundamental to the members' identities, or 2) an innate characteristic which is so fundamental to the identities or

consciences of its members that they either cannot or should not be required to change." *Arteaga v. Mukasey*, 511 F.3d 940, 944 (9th Cir. 2007).

To be eligible for asylum, an applicant must demonstrate that she was or will be "persecuted 'because of' a protected ground," such as membership in a particular social group. *See Parussimova v. Mukasey*, 555 F.3d 734, 738-39 (9th Cir. 2009) (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992)); *see also Soriano v. Holder*, 569 F.3d 1162, 1164-65 (9th Cir. 2009). The REAL ID Act of 2005 applies in this case, *see* Admin. Record ("AR") 139, such that the asylum applicant must show that the protected ground on which she bases her asylum claim constitutes "at least one central reason" for the harm she faces. Pub. L. No. 109-13, Div. B, § 101(a)(3), 119 Stat. 302, 303 (codified at 8 U.S.C. § 1158(b)(1)(B)(i)). While persecution on account of membership in a "particular social group" may qualify an applicant for asylum, mere criminal activity toward the applicant – including vendettas and other personal grudges or conflicts – fails to provide a basis for asylum. *See Zetino*, 622 F.3d at 1015-16; *Molina-Morales v. INS*, 237 F.3d 1048, 1051-52 (9th Cir. 2001). As a close reading of the record shows, this case is about nothing more than criminal activity; it does not concern a social group that could support a claim for asylum.

2. Petitioner's father was – tragically and regrettably – murdered in July 1998, when petitioner was twelve years old and her sister, Iris Maribel, was seven. AR 112, 145, 233-35. The sisters witnessed much of the 1998 encounter at their house that led to the murder. AR 153-58. Their father was killed by four men, identified as Moises Amaya Pineda (known as "Chimbera"), Jose Candelario Climaco (known as "Popo," among other names), and two others known only as "Pinganilla," and "Isaac." AR 112, 149-50, 152-53, 233-34, 239. Popo gave Chimbera the gun, and Chimbera shot petitioner's father. AR 156, 234, 239-40. By early 1999, Chimbera and Popo had both been arrested, tried, and convicted. AR 160-62, 165, 233. Pinganilla was also arrested at some point, but there are no details about his prosecution or whether he caused any further problems. AR 182. Isaac was never found, AR 182, and the record mentions no other incident or threat involving him.

Regarding possible gang membership of the assailants, petitioner testified only that Chimbera had a tattoo on the back of his head, which she recognized as a gang marking. AR 113, 164-65; *see also* AR 289. Petitioner also believed that Popo was in a gang, but she neither explained this belief nor did she know whether he had any gang markings. AR 164. The record does not disclose whether the

two other killers were gang members (although the immigration judge ("IJ") referred to multiple "gang members" without further explanation, AR 119).

Petitioner and her sister identified Popo and Chimbera following their arrests, and appeared as witnesses at a trial concerning the crime. AR 113, 152, 160-62. Popo and Chimbera were both present in the courtroom. AR 162. Petitioner's appearance in court was not the first time Chimbera had encountered her, however. He had known her for five years, and they had crossed paths several times before the murder. AR 148, 169-70, 181, 192, 288-89.

Upon conviction, Popo was sentenced to twenty-five or thirty years in prison. AR 113, 165, 168, 243-44. He was also held liable to petitioner, her sister, and a brother for 50,000 colons (equivalent then to approximately $5,725). AR 244-45. Popo is presumably still incarcerated; there is no contrary statement in the record. Chimbera was sentenced to seven years in prison, receiving a lesser sentence because he was a minor. AR 113, 165, 169, 192. He was released in 2004 or 2006. AR 113, 165, 171.

In 1999, Chimbera escaped from prison and was at large for an unspecified period of time. AR 113, 166, 171. Following the escape, petitioner did not encounter Chimbera, but her sister, Iris Maribel, did. AR 171-72. The sighting occurred when Chimbera was working as a fare-collector on a bus, and the two

saw each other. AR 171-72. The chance meeting prompted Iris Maribel to travel to the United States. AR 173. Chimbera was also seen in petitioner's neighborhood in 1999 or 2004, but the police picked him up. AR 173-74; *see also* AR 180-81. The only threat mentioned in connection with this incident was a statement by another sister of petitioner's that "these people had escaped and that they were going to find [petitioner] and they were going to harm [her]." AR 175.

Petitioner did not know the reason for her father's murder or why Popo and Chimbera targeted him. AR 116, 154, 168-70, 184, 191, 193. Prior to the murder, however, they had both previously gone to petitioner's house to steal. AR 150-51, 181, 234-35, 243. There was also vague hearsay that "some men" who had killed petitioner's father did so "because somebody else had told them to kill him." AR 167-68. Petitioner learned about these unidentified men when she went to her father's house in 2000 to retrieve papers, and was told by the caretaker that the men had asked about her and that she should not to return. AR 166-67, 294-95.[1]

The only specific threat that Chimbera made against petitioner was a "look of anger" he gave her at the end of the 1998-99 trial where she testified. AR 164. (Popo briefly pursued petitioner with a knife during the attack on her father, but

[1] The panel's concurring opinion describes these visitors as "suspected MS [gang] members," 2011 WL 3915529, at *2, but the IJ did not make such a finding; it is only conjecture.

she escaped, AR 153-54; the record mentions no further threat posed by Popo.) Petitioner mentioned that the financial liability imposed during the criminal proceedings could also be a possible motive for revenge against her. AR 178.

Petitioner described a few other occasions that caused her concern, but they did not involve any explicit connection to gangs. Petitioner said that an unidentified person came by her school in 2005 and asked for her. AR 114, 175-76. The man "was dressed very normally like a civilian," and petitioner did not see that he had any tattoos nor did "he look[] like he had any bad intentions," but she thought the incident was odd. AR 115, 176.[2] Petitioner further described a stranger who recognized her as "the daughter of the man that died," AR 177, 189 – but again there was no indication this event was connected to a gang. One of petitioner's sisters also said that "they will kill" petitioner – but the sister did not indicate who "they" were or how the sister knew this. AR 179. The assertion was related to a report received shortly before petitioner's 2007 immigration court hearing that Chimbera had been working in the town where she grew up, that he had injured someone, and that he was "asking for" petitioner (as well as another

[2] The panel's concurring opinion describes the school visitor as a "suspected MS [gang] member[]," 2011 WL 3915529, at *2, but no such finding was made by the IJ; it is speculative.

unnamed person) "[s]upposedly [as] persons that he has on his list because these are the people that have harmed him." AR 179; *see also* AR 166, 182.

3. In granting petitioner's asylum application, the IJ found that petitioner was a member of a "particular social group" consisting of "people testifying against or otherwise oppos[ing] gang members," and that she had been persecuted on this basis. AR 119. On appeal to the Board, the Department of Homeland Security ("DHS") argued, among other issues, that (1) petitioner failed to prove a "particular social group" cognizable under asylum law, AR 44-46; and (2) even assuming the existence of such a group, petitioner also failed to prove a causal connection between the group and any harm she suffered or feared, AR 46-48. In supporting the IJ's decision, petitioner's brief cited to an El Salvador witness and victim protection law without providing a copy of it (in any language) and which had not previously been provided to the IJ. AR 13-14. The law appears to concern witnesses and victims *generally*, and not just those testifying about or affected by gangs. AR 206. The Board found petitioner's reference to this law to be unpersuasive. AR 3-4.

The Board reversed the grant of asylum solely on the basis that petitioner had not proven the existence of a cognizable "particular social group." AR 3-4. Following a petition for review to this Court, the panel issued an apparently

unanimous unpublished decision, together with a concurring opinion by Judge Bea in which Judge Ripple joined. *See* 2011 WL 3915529 (9th Cir. Sept. 7, 2011).

ARGUMENT

Under Fed. R. App. P. 35(a), "en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." The present case fails to meet either of these tests. Regarding the first, there is no conflict among the cases that govern the disposition of this case. With respect to the second test, the record in this case is not adequate for en banc consideration of any question of exceptional importance that may exist regarding "particular social groups." There is no evidence on this record that people in El Salvador who testify against gang members constitute a social group. And even if such a group existed, petitioner's membership in the group does not constitute "one central reason" for any feared harm, such that the social group issue is not exceptionally important here.

1. a. No one has questioned that the panel correctly relied on the Court's decisions in *Velasco-Cervantes v. Holder*, 593 F.3d 975 (2010); *Soriano v. Holder*, 569 F.3d 1162 (2009); and *Santos-Lemus v. Mukasey*, 542 F.3d 738 (2008), to uphold the Board's determination that petitioner failed to show the

existence of a legally cognizable social group. The panel's lead opinion relied on these cases, *see* 2011 WL 3915529, at *1, and the concurring opinion repeatedly acknowledged that these cases dictate the panel's result, *see id.* at *2, *6. Similarly, the petition for rehearing disputes neither the controlling nature of these decisions nor the result they dictate in this case (the petition, instead, simply reiterates the concurrence as well as arguments in the opening brief). It is noteworthy as well that neither the panel's lead opinion nor the concurrence identified any specific conflict between these controlling cases and other Ninth Circuit precedent that would have prevented the panel from deciding the case on its own. *Cf. United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc) (per curiam) (ruling that a panel faced with an irreconcilable conflict in circuit law must call for en banc proceedings). The absence of such a conflict demonstrates that en banc rehearing is unwarranted.

b. Rather than alleging a conflict among precedents requiring different results in the present case, Judge Bea's concurring opinion takes a broader view and contends that the tests for identifying "particular social groups" have not been thoroughly considered and may not be producing consistent results. *See* 2011 WL 3915529, at *3-*6. With respect to the "social visibility" criterion for identifying a social group, the concurrence asserts that the Court has "practically ignored" this

criterion, in part by not "specif[ying] the relevant community for this analysis." *Id.* at *3. It appears, however, that the Court actually has specified the relevant community as "the country" where the alleged persecution would occur. *See Arteaga*, 511 F.3d at 945. In any event, this is the rule the Board has adopted, *see In re S-E-G-*, 24 I. & N. Dec. 579, 586-87 (BIA 2008), and this interpretation is entitled to deference, *see Ramos-Lopez v. Holder*, 563 F.3d 855, 859-61 (9th Cir. 2009). The concurrence explains neither why deference to the Board on this point is inappropriate nor why the issue makes any difference in the outcome here. There is, therefore, no need for rehearing en banc on this issue in this case.[3]

Judge Bea's concurrence further alleges a conflict between this circuit's recent decisions regarding the "particularity" criterion for identifying a cognizable

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[3] The concurrence further refers to Judge Posner's challenge in *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2011), to the "social visibility" criterion. *See also Valdiviezo-Galdamez v. Attorney Gen. of the United States*, 2011 WL 5345436, at *18-*19 (3d Cir. Nov. 8, 2011) (agreeing with *Gatimi*). The government has answered this criticism elsewhere. *See* Br. for Resp't in Opp'n 12-14, *Contreras-Martinez v. Holder*, 130 S. Ct. 3274 (2010) (No. 09-830), 2010 WL 1513110 ("*Contreras-Martinez* Br."); *see also Rivera Barrientos v. Holder*, 2011 WL 3907119, at *9 (10th Cir. Sept. 7, 2011) (disagreeing with the Seventh Circuit's challenge to the "social visibility" criterion); *Valdiviezo-Galdamez*, 2011 WL 5345436, at *17 n.16 (noting circuits that have approved the "social visibility" requirement). In particular, the Board and the government have rejected the suggestion in *Gatimi* -- to which the concurrence here also refers, *see* 2011 WL 3915529, at *3 -- that "social visibility" requires a characteristic that is "identifiable to a stranger on the street." *See In re S-E-G-*, 24 I. & N. Dec. at 586-88; *Contreras-Martinez* Br. 12-14.

social group and a 1985 decision by the Board suggesting that "particularity" was not a necessary criterion. *See* 2011 WL 3915529, at *4 (comparing the Court's 2009 *Soriano* decision with language in *In re Acosta*, 19 I. & N. Dec. 211 (BIA 1985), *overruled in part on other grounds*, *In re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987)). This Court has recognized, however, that in the intervening years the Board has "clarif[ied]" the manner in which "particular social groups" are identified, in part by adopting the "particularity" criterion. *See Arteaga*, 511 F.3d at 944-45; *see also In re S-E-G-*, 24 I. & N. Dec. at 582 (stating that "'particularity' . . . give[s] greater specificity to the definition of a social group" beyond the definition provided in *Acosta*). Thus, the analysis for defining social groups have evolved, and this Court's recognition of that development does not mean that its decisions conflict, either internally or with earlier Board decisions, in a manner that warrants rehearing en banc.

The concurring opinion in the present case further contends that the Court's "cases are not consistent on the issue of shared kinship or origin as a *sine qua non* of particularity." 2011 WL 3915529, at *4. The concurrence compares the Court's decisions that Mexican homosexuals with female identities and Somalian women threatened with genital mutilation constitute "particular social groups," with decisions that witnesses against gang members and people resisting gang

recruitment do not. *See id.* at *5. But these cases are not irreconcilable. While some cases in which "particular social groups" have been recognized may concern individuals who could also have a broad array of backgrounds, it is fair to say that the relevant characteristics of these groups are basic to members' individual identities. By contrast, serving as a witness or being recruited by a gang are events not likely to contribute substantially to a person's sense of identity, such that these characteristics are insufficient to define social groups cognizable under asylum law. *Cf. In re C-A-*, 23 I. & N. Dec. 951, 958 (BIA 2006) (shared past experience alone does not suffice to establish persecution on account of a protected ground). Rehearing en banc is therefore unnecessary to reconcile these lines of cases.

Finally, the concurrence contends that the Court's "particular social group" cases are "at odds" with decisions in the Fourth, Sixth, and Seventh Circuits. *See* 2011 WL 3915529, at *5. This also is not a reason to rehear the present case en banc. None of the cases cited in the concurrence actually concern witnesses as a "particular social group," and instead concern family members and former gang members. *See id.* at *5 & n.5. There is, thus, no inter-circuit conflict among these cases that requires resolution.

2. Apart from the absence of substantial conflict in the law, this case is also unsuitable for en banc consideration because, on the record before the Court, the case does not present an exceptionally important question. Simply put, there is no evidence in this case that witnesses against gangs are perceived as a social group in El Salvador. As the most notable evidence on the issue, the concurrence identifies legislation enacted in that country purportedly protecting such witnesses. *See* 2011 WL 3915529, at *6. Yet there is no evidence that the legislation was specifically directed at witnesses who testify against gang members (the only relevant group at issue here). Petitioner failed to provide a translation of the legislation when she cited it to the Board, AR 13-14, and a reliable public source indicates it was intended to protect not only *all* witnesses facing threats but also "victims . . . and any other person who is in any situation of risk or danger" arising from an investigation or a judicial proceeding.[4] Thus, on this record, the

[4] The Global Legal Information Network, a service accessible through the Law Library of Congress website, www.loc.gov/law, provides English language summaries of foreign legislation. A summary for the statute cited by petitioner (accessible through the website using "GLIN ID" number 180186) reads as follows: "Legislative Decree 1029 of 11 May 2006 promulgates the Special Law for the protection of victims and witnesses whose object is to regulate measures of protection and care to be provided to victims, witnesses and any other person who is in any situation of risk or danger, as a result of her intervention in the investigation of crimes or judicial process." *See also* AR 206 (referring to the statute as a "witness and victim protection law").

legislation is not evidence of a social group consisting specifically of witnesses who testify against gang members.

The record also fails to disclose any other evidence of a possible social group. The only witnesses against gang members mentioned during the immigration court hearing were petitioner and her sister. AR 152, 161-62, 164. There was no testimony regarding any other witnesses giving evidence against gang members, nor any testimony from petitioner (the only witness in immigration court) that either she or anyone else perceives her or her sister to be in a social group as a result of their testimony in El Salvador. Furthermore, the only documentary evidence regarding any witnesses with some connection to gangs showed the murder of one witness by gang members – but the subject of that witness's testimony is not stated, nor is the nature of testimony by other witnesses who were killed and whose murderers are not mentioned. AR 206. In sum, there is actually no evidence in this case that witnesses against gangs are perceived as a social group in El Salvador. *Cf. Ramos-Lopez*, 563 F.3d at 859 (describing need to consider facts relevant to social group determination); *In re S-E-G-*, 24 I. & N. Dec. at 587 (examining evidence relevant to social group issue).

Finally, even if a cognizable social group existed here, the asylum claim still fails, such that further examination of the case would serve little purpose. On

remand, the Board would still need to consider DHS's argument that petitioner failed to prove that her social group membership is "one central reason" for the harm she fears. AR 46-50. However, nothing that happened to her prior to testifying in the El Salvador criminal court constitutes persecution on account of the proffered social group because she was not yet a group member, and she thus has no presumption of a well-founded fear of future persecution. *See* 8 C.F.R. § 1208.13(b)(1). And as for actual proof of such fear, the only substantial source of possible harm is Chimbera, but there is nothing to show either that the threat he poses to petitioner is anything more than personal revenge, or that his gang membership or anyone else's is anything more than incidental to the threat. *See Molina-Morales*, 237 F.3d at 1052 (criminal threat posed by politician did not make threat one based on political opinion); *see also Zetino*, 622 F.3d at 1015-16 (fear of family members' murderers and of random violence by gang members in El Salvador showed no connection to a protected ground).

CONCLUSION

For the above reasons, the petition for rehearing en banc should be denied.

Respectfully submitted,

/s W. Manning Evans
W. MANNING EVANS, Trial Attorney
U.S. Department of Justice, Civil Division

Date: November 9, 2011

CERTIFICATE OF COMPLIANCE

I certify that pursuant to 9th Cir. R. 40-1(a), the attached Respondent's Opposition to Petitioner's Petition for Rehearing En Banc complies with Fed. R. App. P. 32(c)(2) and:

(1) is proportionally spaced using Times New Roman type;

(2) has a typeface of 14 points or more; and,

(3) does not exceed 15 pages.

/s W. Manning Evans

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Date: November 9, 2011